Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-583

STATE OF MINNESOTA,

Petitioner,

v.

WILLIAM HELENBOLT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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No. ————

STATE OF MINNESOTA,
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WILLIAM HELENBOLT,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

INTRODUCTION

The petitioner, the State of Minnesota, requests that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Minnesota entered in these proceedings on July 16, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Minnesota is reported at — Minn. —, 280 N.W.2d 631 (1979) and is printed as Appendix A. The Order of the Supreme Court staying the proceedings until the determination of

the Petition for Rehearing filed by the State of Minnesota is not yet published in the reports of the court but is printed as Appendix B. The Order of the Supreme Court denying the Petition for Rehearing is not yet published in the reports of the court but is printed in Appendix C. The Orders of the District Court of the Sixth Judicial District from which the original appeal was taken are not published in reports of the court but are printed as Appendix D.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3). Judgment of the Supreme Court of the State of Minnesota was entered on July 16, 1979, when the Petition for Rehearing was denied. Minnesota Rules of Appellate Procedure 136.02; 140. This Petition of Certiorari is filed less than ninety (90) days from the date of the entry of the judgment of the Supreme Court of the State of Minnesota.

QUESTION PRESENTED

May a prosecutor question an accomplice of the defendant at the trial of the defendant about statements voluntarily made by the accomplice during a pre-trial interrogation by the police at which the accomplice waived his right to invoke his Fifth Amendment privilege against self-incrimination?

CONSTITUTIONAL PROVISION INVOLVED

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ." Constitution of the United States, Amendment V.

STATEMENT OF THE CASE

The defendant in this case is charged with the murder of Robert Noffsinger, a coin collector, in Duluth on January 8, 1979. The murder occurred during a burglary of the Noffsinger residence. Mark Bailey, an accomplice of the defendant, was arrested in the State of Florida on January 23, 1979, on a charge of burglary from the State of Wisconsin. (T. 12-13).[1] Sgt. John Hall of the Duluth Police Department flew to Florida on the same day and questioned Bailey at the Fort Lauderdale Police Department. (T. 13). At the beginning of the questioning Sgt. Hall advised Bailey of his constitutional rights. (T. 15-17). Bailey indicated to Sgt. Hall that he understood his constitutional rights and that he was willing to talk to him. (T. 17). During the questioning Bailey told Sgt. Hall that the victim had returned home and confronted him and the defendant as they were carrying coins out of the house. (T. 23). At that point Bailey fled from the scene and ran to a shopping mall across the street from the residence of the victim. (T. 24). Later, the defendant joined Bailey at the shopping mall and told Bailey that he had killed Noffsinger because Noffsinger recognized him. The defendant told Bailey that he had been in a fight with the victim and had knocked him out. The defendant then went to a

[1]The question of law presented in this case centers on the effect of the waiver by Bailey of his constitutional rights when he was questioned in Florida. Therefore, the prosecutor and the State Public Defender made a joint decision to submit to the Minnesota Supreme Court the portion of the transcript of the Omnibus Hearing in State of Minnesota v. William Helenbolt, District Court File No. 13757, and the portion of the transcript of the Omnibus Hearing in State of Minnesota v. Mark Bailey, District Court File No. 13810, that contained testimony on the questioning of Bailey. All references in this Statement of the Case refer to the transcript in State v. Helenbolt unless otherwise noted.

garage and got a sledgehammer and killed Noffsinger by striking him in the head. (T. 25). Both Bailey and the defendant then returned from the shopping mall to the Noffsinger residence and completed the burglary. (T. 52).[2]

At the Omnibus Hearing in this case the State of Minnesota, pursuant to Minnesota Rules of Criminal Procedure 10.01 and 11.04, asked the trial court to rule on the question which now is the subject of this Petition for Writ of Certiorari. The trial court ruled in the negative. Although the trial court concluded that Bailey waived his privilege against self-incrimination at the time of the pre-trial interrogation, it ruled that he could still rely upon the privilege to prevent being questioned at the trial of the defendant about the facts that he had voluntarily disclosed.[3] The State of Minnesota then took an appeal to the Supreme Court of the State of Minnesota pursuant to Minnesota Rule of Criminal Procedure 29.03.[4]

The ruling of the trial court was affirmed by the Minnesota Supreme Court. On an appeal from a pre-trial order the prosecution must show that the ruling of the trial court was clearly erroneous and that it would have a critical

[2]This reference is to the transcript in State v. Bailey.

[3]See Paragraph No. 15 in the Findings of Fact, Conclusions of Law, and Order of the District Court in Appendix D. [See also, Memorandum of the trial court in Appendix D.]

[4]While the appeal in this case was pending in the Supreme Court of the State of Minnesota, the prosecution proceeded to go to trial against Bailey. Bailey had been charged with burglary and murder. The murder charge was based on a section of the Minnesota aiding and abetting statute that holds a person responsible for any other crime committed in pursuance of the intended crime if reasonably foreseeable by him as a probable consequence of committing the crime intended. Minn. Stat. §609.05, Subd. 2. The trial ended with a conviction on the burglary charge and the declaration of a mistrial on the murder charge due to the inability of the jury to reach a unanimous verdict on that charge. A retrial of the murder charge ended on September 26, 1979 with a verdict of not gulity.Defense counsel has informed the prosecutor that Bailey intends to appeal a burglary conviction.

impact on the outcome of the trial. *State v. Webber,* — Minn. —, 262 N.W.2d 157 (1977). The Minnesota Supreme Court held that the prosecution had not met that burden of demonstrating error on the constitutional question presented.

REASONS FOR GRANTING THE WRIT

In this case of first impression the rationale of the courts below is contrary to the evolving interpretation of the Fifth Amendment by this Court. The starting point for the position taken by the State of Minnesota is the fundamental principle that society has a right to the testimony of every person. *Garner v. United States,* 424 U.S. 648 (1976); *United States v. Mandujano,* 425 U.S. 564 (1976). In the words of Chief Justice Marshall, the "public has the right to every man's evidence". See *United States v. Mandujano,* supra, quoting *United States v. Burr,* 25 F.Cas. 38 (No. 14692e) (C.C. Va. 1807). This duty of every citizen to give evidence is not absolute, however. A witness may excuse his responsibility to society in this regard by asserting a valid privilege against testifying. See *United States v. Mandujano,* supra. In this case, Mark Bailey is attempting to avoid being called as a witness by the prosecution at the trial of the defendant by asserting the Fifth Amendment privilege against self-incrimination.

The State is seeking to question Bailey about the facts that he voluntarily disclosed to Sgt. John Hall in Florida on the day of his arrest. It is conceded that the answers to the questions that the State would ask of Bailey on direct examination would incriminate him (as well as the defendant). The question then becomes whether Bailey's waiver of his privilege against self-incrimination at the time of his interrogation in Florida forecloses a valid claim of the privilege at the trial of the defendant.

A person may waive his privilege against self-incrimination. *Miranda v. Arizona,* 384 U.S. 436 (1966). Once a person has made a valid waiver of the privilege, he cannot revoke his waiver so as to preclude questioning about facts that he has voluntarily disclosed. In *United States v. Kordel,* 397 U.S. 1 (1970), the government used in a criminal prosecution the answers of the defendant to interrogatories submitted in a previous civil proceeding brought by the government against the defendant's corporation. The defendant did not claim his privilege against self-incrimination at the time that he answered the interrogatories in the civil action. This Court held that the failure of the defendant to assert his constitutional privilege left him in no position to complain that he was compelled to give testimony against himself. The Fifth Amendment rationale in *Kordel* was again expressed in *Garner v. United States,* 424 U.S. 648 (1976), where the defendant was convicted of conspiracy to fix sporting events in violation of 18 U.S.C. §371. At the trial the government introduced income tax returns of the defendant in which he had listed his occupation as "professional gambler" and had reported income from "gambling". The government used this evidence to rebut the claim of the defendant that his relationships with other conspirators were innocent. This Court held that the defendant was foreclosed from invoking his privilege against self-incrimination at the trial since he did not claim the privilege at the time that he made the disclosures on the income tax returns.[5]

[5]See *Minnesota State Bar Association v. Divorce Assistance Association,* — Minn. —, 248 N.W.2d 733 (1976). In that case the defendant admitted in pleadings that he was not licensed to practice law. At a subsequent deposition he asserted his privilege against self-incrimination when he was asked the same question. The Minnesota Supreme Court held that the admission in the pleadings constituted a waiver of his right to refuse to testify at the deposition on that matter.

In both *Kordel* and *Garner,* the defendants waived their privilege against self-incrimination by failing to claim the privilege at the time that the government sought information from them. This Court held that the defendants could not make a valid assertion of the privilege in subsequent criminal proceedings so as to preclude the use of the information obtained from them. So in this case, Bailey cannot now preclude the State from questioning him about the facts that he voluntarily disclosed.[6]

It is significant in this case that the prosecution is not seeking to question the witness (Bailey) about facts that might tend to further incriminate him. A witness who waives his constitutional right to remain silent and discloses his criminal connections cannot then refuse to answer additional questions that would not further incriminate him. *Rogers v. United States,* 340 U.S. 367 (1951).[7]

The Fifth Amendment rationale of the trial court is clearly erroneous as it is contrary to the interpretation of the privilege against self-incrimination set forth in *Kordel* and in *Garner.* The only other rationale upon which the Minnesota Supreme Court may have relied in affirming the trial court is that a refusal by Bailey to answer questions on cross-examination about facts that he has not yet disclosed would violate the Sixth Amendment right of the defendant to confront the witness against him. The defendant attempted to raise this Sixth Amendment issue in the trial court and in the Minnesota Supreme Court. However, the issue is hypothetical at this point and is unlikely

[6]It is necessary to call Bailey as a witness at the trial of the defendant in order to use the facts disclosed by Bailey. If the State were to attempt to call the police officer to testify about the statements made by Bailey, then the defendant would have valid objections based on the hearsay rule and the Confrontation Clause of the Sixth Amendment. See *State v. Gruber,* — Minn. —, 264 N.W.2d 812 (1976).

to become a real issue at trial. Bailey can assert his privilege against self-incrimination and refuse to answer a question only if his answer would tend to further incriminate him. *Rogers v. United States,* supra. In his confession Bailey readily admitted full participation in the burglary of the Noffsinger residence, but he laid the entire blame for the murder of Noffsinger on the defendant. The only way in which Bailey could further incriminate himself would be to change his confession and to admit to some degree of participation in the murder. The lower court decisions cannot be supported on a Sixth Amendment rationale since the issue is hypothetical at this stage. See *Kremens v. Bartley,* 431 U.S. 119 (1977); *O'Shea v. Littleton,* 414 U.S. 488 (1974).[8] The Sixth Amendment question will become an issue at trial only if the trial court determines that Bailey may refuse to answer a specific question because the answer would tend to further incriminate him.

It should also be noted that the ruling below would have a critical impact on the outcome of the trial. Although the circumstantial evidence places both the defendant and Bailey at the scene of the homicide, it does not identify

[7]In *Rogers,* the defendant admitted in testimony before a Grand Jury that she was a member of the Communist Party, but she refused to identify the person to whom she had turned over the books of the party. This Court sustained her conviction for contempt. One may look askance at reliance on *Rogers* since it comes from a dark period in the history of our country. However, the principle that a witness may not make a valid claim of the Fifth Amendment privilege when the answer to the question would not tend to further incriminate him is sound, and the commentators have recognized *Rogers* as the leading case. *McCormick on Evidence* (2d Ed. 1972) §140; *8 Wigmore on Evidence* (McNaughton Rev.) §2276 n. 2. That the principle enunciated in *Rogers* has continuing vitality is seen by the reliance on *Rogers* in *United States v. Mandujano,* 425 U.S. 564 (1976), and *Garner v. United States,* 424 U.S. 648 (1976).

which person was the murderer of Robert Noffsinger.[9] The only direct evidence available to the State as to the events of the night of Monday, January 8, 1979, at the Noffsinger residence is the voluntary statement that Bailey gave to Sgt. Hall. The only way in which the State can prove that the defendant is guilty of murder is to call Bailey as a witness at the trial of the defendant to testify about the facts that he voluntarily disclosed to the police after waiving his privilege against self-incrimination.

CONCLUSION

The Fifth Amendment rationale of the trial court for its ruling is contrary to the evolving interpretation of the Fifth Amendment by this Court. The determination of the question in this case requires the Court to balance the twin interests of society in the presentation of all relevant facts to the jury and in the effective prosecution of criminal activity against the interest of the witness in protecting his privilege against self-incrimination. In this case the interest of the witness (Bailey) was accorded its legitimate protection by giving him the opportunity to assert his right to remain silent after he had been fully advised of his constitutional rights by the police officer. Once he waived his privilege against self-incrimination, then the interests of society require him to testify at the trial of the defendant about the facts that he has voluntarily disclosed, provided

[8]It was necessary for the State to ask the trial court whether it may call Bailey as a witness because case law prohibits the State from calling a witness who has a *valid* Fifth Amendment privilege. *State v. Mitchell,* 268 Minn. 513, 130 N.W.2d 128 (1964).

[9]The circumstantial evidence is described in the police reports filed with the court. These reports are filed with the trial court for its use in determining the issue of probable cause at the Omnibus Hearing in accordance with *State v. Florence,* 306 Minn. 442, 239 N.W.2d 892 (1976).

that he is not compelled by the government to further incriminate himself. The application of the Fifth Amendment in the context of this case by the lower courts is inconsistent with the decisions of this Court. Therefore, the State of Minnesota requests this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Minnesota.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

No. 305 St. Louis County Per Curiam

State of Minnesota,

Appellant,

vs.

William Helenbolt,

Respondent.

Considered and decided by the court en banc without oral argument.

OPINION

PER CURIAM

This is a pretrial appeal by the state pursuant to Rule 29.03, subd. 1, Rules of Criminal Procedure, from an order of the district court denying a motion by the state to compel testimony by defendant's alleged accomplice at defendant's trial without granting the accomplice immunity from prosecution. The defendant, in a motion to dismiss, argues that the state has failed to demonstrate clearly and unequivocally that the trial court erred in its decision and that the court's ruling will have a critical impact on the outcome of the trial. Although we deny the motion to dismiss, we agree that the state has not met its burden of demonstrating error, and accordingly we affirm. See, State v. Weber, 262 N.W.2d 157 (Minn. 1977).

Affirmed.

APPENDIX "B"

STATE OF MINNESOTA
Office of Clerk of Supreme Court

ST. PAUL, MINN.

State of Minnesota,

Appellant,

vs.

William Helenbolt,

Respondent.

June 13, 1979

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

Application for reargument having been filed herein all further proceedings, except taxation of costs, are stayed pending its determination.

Yours respectfully,

JOHN McCARTHY
Clerk Supreme Court.

☛ A petition for reargument does not stay taxation of costs and disbursements.

APPENDIX "C"

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Appellant,

vs.

William Helenbolt,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that appellant's petition for rehearing in the above-entitled matter be, and the same is, hereby denied.

Dated: 7-16-79.

BY THE COURT:

/s/ ROBERT J. SHERAN
Chief Justice

APPENDIX "D"

STATE OF MINNESOTA — DISTRICT COURT
County of St. Louis — Sixth Judicial District

State of Minnesota,

Plaintiff,

vs.

William Warren Helenbolt,

Defendant.

Clerk's File No. 13767

ORDER

An Omnibus Hearing in the above-entitled matter was heard before the Honorable Donald C. Odden in District Court on March 2, 5 and 6, 1979. The defendant appeared with his attorney, Rodney Brodin. The State of Minnesota was represented by Michael W. McNabb, Assistant St. Louis County Attorney. Mark Bailey was present during the entire proceedings, and his attorney, Robert Lucas, appeared at the time so indicated in the record. The Court, having considered the testimony presented at the hearing, the arguments of counsel, and the record contained in the District Court file, now makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On January 11, 1979, Officer Peter Hansen of the Duluth Police Department seized an envelope addressed

to the defendant which he found on the premises of the Robert Noffsinger residence during an investigation of a burglary and a homicide at the residence. During the investigation at the scene of the Noffsinger residence, Duluth Police officers also discovered that the window in a door of the residence and the wood frame of the window were broken and that pieces of glass were on the ground. Inside of the door, the officers found a cigar box with one roll of coins and another box with several rolls of coins. In the yard outside of the Noffsinger residence, the officers found a piece of gum and also saw a place in the snow which appeared to be an area of struggle.

2. On January 12, 1979, Sgt. Gary Waller of the Duluth Police Department seized physical specimens of the defendant, including hair, fingernail scrapings, and blood pursuant to a search warrant that had been issued by Judge Galen Wilson of the St. Louis County Court on January 12, 1979. The blood sample was obtained at St. Luke's Hospital in Duluth by a medical technologist who used a syringe. Pursuant to this same search warrant, a physician at St. Luke's Hospital conducted a medical examination of the defendant. In addition, photographs of abrasions and other physical markings on the defendant were taken. Sgt. Waller gave a copy of the search warrant and receipts to the defendant. Sgt. Waller executed the search warrant and returned the search warrant and inventory to the Court within ten days from the date of issuance of the warrant.

3. On January 12, 1979, Duluth Police officers seized various items from the defendant's residence, truck, and

garbage can pursuant to a search warrant issued by Judge Galen Wilson of the St. Louis County Court on January 12, 1979. The inventory attached to the search warrant lists the items seized and the places from which the items were seized. The officers left a copy of the search warrant and receipt at the defendant's residence. The officers executed the warrant and returned the warrant and inventory to the Court within ten days of the issuance of the warrant.

4. On January 12, 1979, Officer Beverly Young of the Duluth Police Department seized a pillow case from a trash bundle at the First National Bank in Duluth pursuant to the consent of a proper employee of the bank. On the same day, Officer Jeannette Laine of the Duluth Police Department seized coins which were turned over by another employee of the First National Bank. The defendant had brought coins in a pillow case to the bank on January 9 for deposit in his checking account. The defendant left the pillow case with the teller and told her that she could throw it away.

5. On January 13, 1979, Duluth Police officers seized a suitcase and two boxes and the contents of those containers from the Joyce Steinhart residence in Grand Rapids, Minnesota. This seizure was done with the consent of Joyce Steinhart. The evidence does not establish that the defendant was a co-inhabitant of the Steinhart residence or that he had joint access or control over the residence for most purposes.

6. On January 13, 1979, the defendant had a telephone conversation with Joyce Steinhart about the suit-

case and two boxes and the contents of those containers which Joyce Steinhart had discovered in her residence.

7. On January 13, 1979, Officer Harvey Dahline of the Grand Rapids, Minnesota Police Department arrested the defendant. At that time, Officer Dahline conducted a search of the person of the defendant and seized personal belongings of the defendant. These personal belongings included a comb, jackknife, checkbook, United States currency, billfold, beads, magnifying glass and pouch.

8. On January 13, 1979, Deputy Robert Serich of the Itasca County Sheriff's Office seized clothing from the person of the defendant as the defendant was being booked at the Itasca County Jail following his arrest by Officer Dahline. The clothing seized by Deputy Serich included a vest, jacket, and pair of gloves.

9. On January 15, 1979, Officer Darrell Roberg of the Duluth Police Department showed a photo line-up to Elouise Heath and Joyce Lutterman in Grand Rapids, Minnesota. The photo line-up included a picture of the defendant. Each witness separately selected the photograph of the defendant.

10. On January 15, 1979, Officer Roberg seized a business card of the defendant from a trash receptacle at the First Northwestern National Bank in Grand Rapids, Minnesota.

11. On January 15, 1979, Officer Roberg seized a check at the First Northwestern National Bank in Grand Rapids, Minnesota. The check was drawn by Carol Moore and made payable to the defendant. The check was seized

with the consent of Carol Moore and Steven Bergerson, an employee of the bank.

12. On January 12, 1979, the defendant made oral statements to Sgts. John Hall and James Bujold of the Duluth Police Department at his trailer home residence at 4371 Ugstad Road in the City of Hermantown. The defendant was not under arrest at the time, and he was not being interrogated by the police officers at the time. The defendant went with the officers to police headquarters in Duluth where he gave an oral and written statement to the officers. During the course of the written statement, Sgt. Hall fully advised the defendant of his constitutional rights. The defendant told Sgt. Hall that he understood his constitutional rights and that he wished to continue with the written statement. The written statement was then completed. Following the questioning, the defendant was not placed under arrest and was allowed to return to his home.

13. On January 12, 1979, Sgt. Hall seized the defendant's boots with the consent of the defendant. Officer Barry Brooks of the Duluth Police Department took the fingerprints of the defendant with his consent.

14. On or about January 15, 1979, Deputy Duane Johnson of the St. Louis County Sheriff's Office took the defendant's fingerprints at the St. Louis County Jail. These fingerprints were taken in the course of the booking process after the defendant was transferred from the Itasca County Jail to the St. Louis County Jail following his arrest in Grand Rapids, Minnesota.

15. On January 23, 1979, Sgt. Hall questioned Mark Bailey in Fort Lauderdale, Florida, following the arrest of Bailey on a warrant from the State of Wisconsin. Sgt. Hall fully advised Bailey of his constitutional rights before he questioned him. Bailey told Sgt. Hall that he understood his constitutional rights and that he wished to talk to Sgt. Hall. Bailey then gave an oral statement to Sgt. Hall.

16. The issue of probable cause to hold the defendant for trial was submitted to the Court on the basis of the reports filed by the prosecution with the Court.

CONCLUSIONS OF LAW

1. According to the evidence presented at the Omnibus Hearing, the defendant did not have common authority over the premises of Robert Noffsinger. Therefore, the defendant does not have standing to object to the seizure of the envelope found on the Noffsinger premises or to the seizure of other items found on the Noffsinger premises.

2. The facts presented in the application for the search warrant authorizing the seizure of physical specimens of the defendant established probable cause for the search. The scope of the search was within the limits described in the search warrant itself and within constitutional limits. The execution and return of the search warrant were in compliance with constitutional and statutory requirements.

3. The facts presented in the application for the search warrant for the defendant's premises established

probable cause for the search. In the execution of this search warrant, the police officers came upon items not described in the search warrant. These items clearly and definitely related to the behavior that prompted the issuance of the search warrant, and the officers had probable cause to believe that the items were subject to seizure. Therefore, the scope of the search was within the limits of the search warrant itself and within constitutional limits. The execution and return of the search warrant were in compliance with constitutional and statutory requirements.

4. The defendant abandoned the pillow case and the coins in that pillow case which he delivered to the First National Bank of Duluth on January 9, 1979, for deposit in his checking account. Therefore, the defendant does not have standing to object to the seizure of the pillow case or the coins which the defendant delivered to the bank for deposit in his account.

5. According to the testimony presented at the Omnibus Hearing, the defendant did not have common authority over the premises of Joyce Steinhart in Grand Rapids, Minnesota. Therefore, the defendant does not have standing to object to the seizure of the suitcase and two boxes and the contents of those containers from the Steinhart residence. Moreover, the police officers seized the suitcase and two boxes and contents of those containers with the consent of Joyce Steinhart.

6. The telephone conversation which the defendant had with Joyce Steinhart on January 13, 1979 was not the product of a custodial interrogation by law enforcement officers.

7. Officer Dahline of the Grand Rapids, Minnesota Police Department seized the personal belongings of the defendant incident to the arrest of the defendant.

8. Deputy Robert Serich of the Itasca County Sheriff's Office seized the clothing of the defendant incident to the arrest of the defendant and in the ordinary course of the booking process.

9. The photographic line-up and the manner of the showing of the photographic line-up by Officer Darrell Roberg of the Duluth Police Department to Elouise Heath and Joyce Lutterman in Grand Rapids on January 15, 1979 were not impermissibly suggestive.

10. The defendant does not have common authority over the premises of the First Northwestern National Bank of Grand Rapids, Minnesota. Therefore, the defendant does not have standing to object to the seizure of his business card from the trash receptacle at the bank on January 15, 1979 by Officer Roberg.

11. The defendant does not have standing to object to the seizure of the check drawn by Carol Moore since the check was abandoned when it was presented to the First Northwestern National Bank in Grand Rapids for payment, and the check became the property of the First Northwestern National Bank and/or Carol Moore.

12. The defendant's oral statements to Sgts. John Hall and James Bujold at his residence on January 12, 1979 were not the product of custodial interrogation by law enforcement officers. The defendant's subsequent oral and written statements at police headquarters on January 12

were not the product of custodial interrogation by law enforcement officers. Moreover, during the course of the written statement, the defendant knowingly and intelligently waived his constitutional rights.

13. The boots of the defendant and his fingerprints were seized on January 12, 1979 pursuant to his voluntary consent.

14. The fingerprints of the defendant taken at the St. Louis County Jail on or about January 15, 1979 were taken incident to his arrest and in the ordinary course of the booking process.

15. The Court finds upon the record presented at this Omnibus Hearing that Mark Bailey knowingly and intelligently waived his constitutional rights when he was questioned by Sgt. John Hall in Florida on January 23, 1979. Although Bailey waived his constitutional rights at the time of the interrogation by Sgt. Hall, Bailey may still make a valid assertion of his Fifth Amendment right against self-incrimination at the trial of the defendant according to the rationale of the decisions of the Minnesota Supreme Court.

16. Probable cause to believe that the defendant committed the offenses charged in the Complaint is established by the reports filed with the Court. In making this determination of probable cause, the Court did not take into consideration any of the oral statements made by Mark Bailey to Sgt. Hall on January 23, 1979.

ORDER

1. The envelope seized at the premises of Robert Noffsinger is not subject to exclusion at trial on constitutional grounds.

2. The physical specimens seized from the defendant pursuant to a search warrant are not subject to exclusion at trial on constitutional grounds. In addition, the results of the medical examination of the defendant conducted pursuant to the search warrant and the photographs taken of the defendant are not subject to exclusion at trial on constitutional grounds.

3. The items seized from the defendant's residence, truck and garbage can on January 12, 1979, by Duluth Police officers pursuant to a search warrant and described in the inventory of that search warrant are not subject to exclusion at trial on constitutional grounds.

4. The pillow case seized from the First National Bank of Duluth by Officer Beverly Young and the coins obtained by Officer Jeannette Laine from the First National Bank of Duluth are not subject to exclusion at trial on constitutional grounds.

5. The suitcase and two boxes and contents of those containers seized by Duluth Police officers from the residence of Joyce Steinhart in Grand Rapids, Minnesota are not subject to exclusion at trial on constitutional grounds.

6. The statements made by the defendant during his telephone conversation to Joyce Steinhart on January 13, 1979, are not subject to exclusion at trial on constitutional grounds.

7. The personal belongings of the defendant seized by Officer Harvey Dahline of the Grand Rapids Police Department at the time of the arrest of the defendant are not subject to exclusion at trial on constitutional grounds.

8. The clothing of the defendant seized by Deputy Robert Serich of the Itasca County Sheriff's Office at the time of the arrest of the defendant and his booking at the Itasca County Jail are not subject to exclusion at trial on constitutional grounds.

9. Testimony at the trial of this matter about the pretrial photographic line-up shown by Officer Darrell Roberg of the Duluth Police Department to Elouise Heath and Joyce Lutterman in Grand Rapids, Minnesota on January 15, 1979 is not subject to exclusion at trial on constitutional grounds. Therefore, in-court identification of the defendant by Heath and Lutterman is not barred by the pre-trial identification and the procedure of that identification process.

10. The business card of the defendant seized by Officer Roberg at the First Northwestern National Bank in Grand Rapids, Minnesota is not subject to exclusion at trial on constitutional grounds.

11. The check drawn by Carol Moore and made payable to the defendant and seized by Officer Roberg at the First Northwestern National Bank in Grand Rapids, Minnesota is not subject to exclusion at trial on constitutional grounds.

12. The defendant's oral and written statements to Sgts. John Hall and James Bujold at his trailer residence

and at Duluth Police Department headquarters on January 12, 1979 are not subject to exclusion at trial on constitutional grounds.

13. The boots of the defendant and the fingerprints of the defendant taken on January 12, 1979 with his consent are not subject to exclusion at trial on constitutional grounds.

14. The fingerprints of the defendant taken at the St. Louis County Jail on or about January 15, 1979 in the ordinary course of the booking process are not subject to exclusion at trial on constitutional grounds.

15. A prosecutor may not question an accomplice of the defendant in the trial of the defendant about statements voluntarily made by the accomplice during a pretrial interrogation by police at which the accomplice waived his right to invoke the Fifth Amendment privilege self-incrimination.

16. Since the court has made a finding of probable cause to hold the defendant for trial, the defendant is remanded to the custody of the St. Louis County Sheriff for further proceedings.

17. The Court has received oral notice that the prosecuting attorney intends to appeal the ruling of the Court on the Motion made by the State of Minnesota pursuant to Minnesota Rules of Criminal Procedure 10.01 and 11.04. Therefore, pursuant to Minnesota Rules of Criminal Procedure 29.03, the Court orders a stay of these proceedings for five days to allow the State of Minnesota time to perfect its appeal.

Dated this 12 day of March, 1979.

BY THE COURT

/s/ DONALD C. ODDEN
Judge of District Court

(Title of Cause.)

ORDER

APPENDIX "D"

The above entitled matter came on for hearing before the undersigned at a Special Term of Court at the Court House in the City of Duluth, County of St. Louis, State of Minnesota on a motion brought by the State of Minnesota, under the Minnesota Rules of Criminal Procedure, Rules 10.01 and 11.04, requesting a pretrial ruling as to whether or not an accomplice of the Defendant, at the trial of the Defendant, can be required to testify after invoking his constitutional 5th Amendment rights, in that the accomplice, during pretrial interrogation, had, after being advised of his rights under Miranda, waived those rights and gave a full statement which implicates the Defendant in this trial. The State's theory being, that since the accomplice has waived his right to invoke the 5th Amendment privilege against self-incrimination during police interrogation, he has waived those rights to remain silent at this Defendant's trial and should therefore be compelled by the Court to testify. Michael McNabb, Assistant St. Louis County Attorney, appearing for the State of Minnesota; Rodney Brodin, Assistant Public Defender, appearing for the Defendant William

Helenbolt; and Robert Lucas, Assistant Public Defender, appearing for the accomplice Mark Bailey; and the Court having listened to the arguments of counsel and being well advised in the premises hereby makes the following Order:

IT IS HEREBY ORDERED, That upon the trial of the State of Minnesota versus William Helenbolt, if the accomplice Mark Bailey is called to testify and the said Mark Bailey refuses to testify and invokes his 5th Amendment privilege against self-incrimination, this Court cannot overrule his right to remain silent and compel him to testify merely because he has, prior to trial, waived those rights during pretrial police interrogation, even though he had been carefully explained his Miranda rights and had waived the same.

Dated this 12 day of March, 1979.

BY THE COURT:

DONALD C. ODDEN
Judge of the District Court

MEMORANDUM

Upon the record presented to this Court at the Omnibus Hearing in State vs. William Helenbolt, the accomplice Mark Bailey knowingly and intelligently waived his constitutional rights when he was questioned by Sergeant John Hall of the Duluth Police Department on January 23rd, 1979, in the Police Interrogation Room at Fort Lauderdale, Florida. Although Mark Bailey waived his constitutional rights at the time of the interrogation by Sergeant Hall, Bailey may still make a valid assertion of his 5th Amendment right of self-incrimination at the future trial of Defendant Helenbolt. Although neither attorney nor this Court can find a case directly in point as precedent, the rationale of other decisions involving the 5th Amendment of the Minnesota Supreme Court has lead to this ruling.

DCO

FILED
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-583

STATE OF MINNESOTA,

Petitioner,

v.

WILLIAM HELENBOLT,

Respondent.

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1979

No. ————

STATE OF MINNESOTA,

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Respondent.

BRIEF IN OPPOSITION

INTRODUCTION

The undersigned is a part-time Public Defender in and for the Sixth Judicial District of Minnesota. As such, he was appointed to represent Mark Allen Bailey in January, 1979. That at issue are the 5th Amendment rights of Mark Allen Bailey. That since the right against self-incrimination is a personal right that belongs to Bailey, Bailey is the proper party in interest and should be the named Respondent.

I.

THE WRIT SHOULD NOT ISSUE FOR THE FOLLOWING REASONS:

The Minnesota Supreme Court has not decided a Federal question, but a point of its own criminal appellate procedure.

The State appealed to the Minnesota Supreme Court from a pre-trial Order of District Court Judge Donald C. Odden. This appeal was taken pursuant to Minnesota Rules of Criminal Procedure, Rule 29.03. These Rules were adopted by the Minnesota Supreme Court on July 1, 1975, and superseded certain procedural statutes. The Minnesota Supreme Court requires that the State, in order to perfect its appeal, must demonstrate: (a) That the Trial Court has erred and; (b) That the error will have a critical impact on the trial.

In *State of Minnesota v. Webber,* 262 NW2d 157 (1977), the Court stated as follows:

> "Accordingly, we hold that when an appeal is taken by the State pursuant to Rule 29.03 subd. 1, this Court will only reverse the determination of the Trial Court if the State demonstrates clearly and unequivocally that the Trial Court has erred in its Judgment and that, unless reversed, the error will have a critical impact upon the outcome of the trial."

An easy reading of the decision of the Minnesota Supreme Court in this matter revealed that the State has failed to meet its burden as required by *Webber.*

The Rule in *Webber* is not a new one, but is a judicial modification of the superseded statutes. Minnesota Statutes Annotated 632.11 and 632.12.

II.

The issue is not yet ripe for review by this Court since the Minnesota Supreme Court has not yet passed, nor has it had an opportunity to pass, upon the issue of the voluntariness of Bailey's statement. Judge Odden did indeed find

that Bailey's statement was admissible against Bailey. Bailey's statement was, in fact, used against Bailey in both of his trials. Bailey has no right under Minnesota law to appeal Judge Odden's Order permitting the use of his statement until after he is convicted. Minnesota Rules of Criminal Procedure, Rule 29.02.

Bailey has been advised by his trial counsel to appeal his conviction on several grounds including the lack of voluntariness in the statement give to Sergeant Hall. Bailey has 90 days in which to appeal his conviction to the Minnesota Supreme Court. Rule 29.02 subd. 5 (3). That appeal will be handled in the Minnesota Supreme Court by the State Public Defender pursuant to Minnesota Statutes 611.25.

At no time during any of the proceedings did Bailey take the witness stand, except during a pre-trial hearing in which he denied the statement was voluntary. He alleged that Sergeant Hall made promises in return for the statement, or at least led him to believe that he would be lightly treated in return for the statements.

III.

The Petitioner's claim has no merit. The Petitioner wants this Court to declare that once a person gives a police officer a statement after he has been advised of his simple rights of *Miranda v. Arizona,* 384 U.S. 436, 16 Led2nd 694, 86 Sup. Ct. 1602, 10 ALR3rd 974, then he waives his testimonial privileges of self-incrimination under the 5th Amendment to the U.S. Constitution. The Petitioner is simply confusing apples and oranges. He is attempting to elevate a simple rule of evidence to Constitutional prominence.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-583

STATE OF MINNESOTA,

Petitioner,

v.

WILLIAM HELENBOLT,

Respondent.

PETITIONER'S REPLY ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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PETITIONER'S REPLY ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

This reply is a response to the points raised in the briefs submitted by the respondent, William Helenbolt, and by Mark Bailey.

1. *Jurisdiction.* The Petition for a Writ of Certiorari does seek review of a final judgment on a constitutional issue rendered by the highest Court of the State pursuant to 28 U.S.C. § 1257. The question in this case was first presented to the trial court pursuant to Minnesota Rules of Criminal Procedure 10.01 and 11.04. The question required the trial court to interpret the Fifth Amendment privilege against self-incrimination. The State of Minne-

sota exercised its right to appeal the order of the trial court pursuant to Minnesota Rule of Criminal Procedure 29.03. The Minnesota Supreme Court affirmed the ruling of the trial court on the ground that the State had failed to demonstrate that the ruling was clearly erroneous and that it would have a critical impact on the outcome of the trial. *State v. Helenbolt,* — Minn. —, 280 N.W.2d 631 (1979). The determination that the ruling of the trial court was not clearly erroneous necessarily involved constitutional interpretation of the Fifth Amendment by the State Supreme Court.

It should also be noted that this is the only time at which the State may seek review of this constitutional question. If the case goes to trial without further review and the defendant is acquitted, then the Double Jeopardy Clause of the Constitution would prevent the State from obtaining appellate review at that point. If the case goes to trial and the defendant is convicted, then the constitutional question will be moot. This is a case where there has been a final decision on the constitutional question with further proceedings in the trial court to follow, but in which later review of the constitutional issue cannot be had whatever the ultimate outcome of the case. See *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975). Thus, the decision of the Minnesota Supreme Court is in fact a final judgment.

The respondent's contention that a decision overruling the claim of privilege would not be binding on Bailey because he is not a party to this case is erroneous. Bailey is a prospective witness in this case. It is the responsibility of the trial court in the first instance to determine if a wit-

ness has a valid claim of the privilege against self-incrimination *State v. Moose,* — Minn. —, 266 N.W.2d 521 (1978). In this case, the Minnesota Supreme Court has affirmed the ruling of the trial court that the witness does have a valid claim of the Fifth Amendment privilege. If this Court reverses that judgment, then the trial court would have to follow the constitutional interpretation of the highest court of the land and would order the witness to testify. The witness would have to obey that order on pain of contempt of court.

2. *Case Or Controversy Requirement.* The respondent's contention that Bailey has not yet asserted a claim of the privilege against self-incrimination is erroneous. At his sentencing Bailey indicated through his attorney that he will assert the Fifth Amendment privilege and will refuse to testify in this case. This assertion of the privilege is a matter of record in State of Minnesota v. Mark Allen Bailey, District Court File No. 13863, Transcript of Sentencing p. 15. It should also be clear from the fact that Bailey has filed a brief in opposition that he is asserting the privilege against self-incrimination.

3. *New Case.* After the filing of the Petition for a Writ of Certiorari in this case, the Minnesota Supreme Court handed down a relevant decision in *State v. Hanson,* — Minn. —, 285 N.W.2d — (Nov. 2, 1979). In that case the trial court allowed the State to introduce answers given by the defendant to the State Attorney General during an independent investigation. In doing so the trial court overruled the defendant's claim of the privilege against self-incrimination. The Minnesota Supreme Court affirmed the decision of the trial court and ruled that a defendant must claim a Fifth Amendment privilege in lieu of answering

questions or the privilege is waived. The Minnesota Court cited *Garner v. United States,* 424 U.S. 648 (1976).

The reasoning of the *Hanson* case applies to this case as well. Bailey made a knowing waiver of his privilege against self-incrimination at the time that he was questioned by Sgt. Hall. He may not now refuse on the basis of the Fifth Amendment to testify about the facts that he has already disclosed.

4. *Conclusion.* For the foregoing reasons, as well as those which have been urged in the Petition, certiorari should be granted.

Respectfully submitted,

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